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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 961

HENRY GERKE, JAMES T. BROWN, GERALD R. WADE, CHARLES LARKEY, JAMES HOLLAND AND JOSEPH TURANSKY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 675–683) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 16, 1942 (R. 684). The petition for a writ of certiorari was filed February 17, 1942. The jurisdiction of this Court is conferred

by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules Promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether there was sufficient evidence to warrant submission of the question of petitioners' guilt to the jury.

STATUTES INVOLVED

Section 593 of the Tariff Act of 1930, 46 Stat. 751 (19 U. S. C. Sec. 1593) provides:

> (a) FRAUD ON REVENUE.—If any person knowingly and willfully, with intent to defraud the revenue of the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, * * * every such person, his, her, or their aiders and abettors, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding $5,000, or imprisoned for any term of time not exceeding two years, or both, at the discretion of the court.
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> (b) IMPORTATION CONTRARY TO LAW.—If any person fraudulently or knowingly imports or brings into the United States, or assists in so doing, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been

> imported or brought into the United States contrary to law, such merchandise shall be forfeited and the offender shall be fined in any sum not exceeding $5,000 nor less than $50, or be imprisoned for any time not exceeding two years, or both.
>
> * * * * *

Title 18 U. S. C., Sec. 88 (Criminal Code, Sec. 37) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

Petitioners were convicted (R. 7) upon all three counts of an indictment (R. 10–17) charging, in counts 1 and 2, violations of 19 U. S. C., Sec. 1593 in connection with the importation of 50,000 gallons of alcohol into this country in the tanker *Charles D. Leffler* on April 25, 1936, and, in count 3, a conspiracy to import alcohol into this country between January 1, 1935 and April 25, 1936, in violation of 18 U. S. C., Sec. 88.[1] Each of the petitioners, Wade

[1] At the time of the trial a severance was granted as to defendants Edgar Stanley Collins and Hyman Levin, who were not present (R. 21). Defendant William Josephs was deceased (R. 19). The trial court directed verdicts on counts 1 and 2 as to defendants Watson and Robin at the end of the

(R. 7), Larkey, Holland (R. 8), and Turansky (R. 9), was sentenced to imprisonment for two years on each count, to run concurrently—a total of two years; Gerke was sentenced to imprisonment for two years on count 1, and one year on each of counts 2 and 3, to run consecutively—a total of four years (R. 7); and Brown was sentenced to imprisonment for one year on each of counts 1 and 2, and six months on count 3, to run consecutively—a total of two years and six months (R. 7).

The Government's case may be summarized as follows:

In January 1935 the vessel *Reo I,* captained by defendant Collins, sailed from Yarmouth, Nova Scotia, to engage in "rum-running" (R. 22, 38, 57). Petitioner Gerke was seen on the dock at Yarmouth talking with defendants Collins and Levin before the vessel sailed, and the three were referred to by some of the crew as "some of the big shots" (R. 27–28, 40). The vessel proceeded to St. Pierre, Miquelon, a French possession, where it loaded about 2,000 cases of alcohol (R. 22, 58), and then laid off the New Jersey coast for about a week or two before coming in to Little Egg Inlet, near Barnegat Light, where it discharged the cargo on to small, flat-bottomed boats, contacting the boats on two different nights (R. 23, 58–59).

Government's evidence (R. 332) and the Circuit Court of Appeals reversed their convictions on count 3 (R. 683). The "Morris Slavin" mentioned in the indictment was a fictitious person.

Thereafter it proceeded about thirty miles out to sea off Barnegat Light and contacted the *Accuracy,* also of Yarmouth, Nova Scotia, and took on another cargo of alcohol (R. 23–24, 59–60, 68, 71, 72). The *Reo I* then returned to Barnegat Light and again discharged its cargo on to small boats (R. 24). Four hundred cases of alcohol were unloaded on to a sea skiff and petitioner Brown was on the sea skiff (R. 60). The *Reo I* then went back out to sea and again contacted the *Accuracy,* taking from it another cargo of alcohol (R. 24). The *Reo I* was being "tagged" by a Coast Guard cutter, so it went back to Yarmouth and then returned to the New Jersey coast and proceeded to the mouth of the Raritan River, where "they contacted a small boat and took aboard a pilot"—identified as petitioner Brown. The vessel then proceeded up the river to an old brickyard where the cargo of alcohol was discharged, around midnight, to a number of waiting trucks.[2] (R. 25, 26, 59–63). At the brickyard Gerke and Levin came aboard and spoke to Collins (R. 28, 43). The *Reo I* then returned to Yarmouth (R. 29), Brown leaving the vessel at a coal yard dock at the mouth of the Raritan River (R. 28–29, 62, 64).

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[2] "Fifty or maybe more" men, and "fourteen or fifteen" trucks were waiting at the brickyard (R. 26). The vessel "tied up at two pilings, one at the bow and one at the stern," and they "put planking from the bank to the ship" (R. 62) to unload the alcohol.

In May 1935 the vessel *Augusta and Raymond,* captained by Collins, sailed from Halifax, Nova Scotia. Gerke and Levin were at the dock and Gerke came aboard before the vessel sailed. It proceeded out to sea, off Gallantry Head, about 25 miles off St. Pierre, where it contacted a tramp steamer and took on 4,000 cases of alcohol, which cargo was later discharged at night near New York on to small yachts which were attracted to the vessel by an "orange light over the wake" flashed at regular intervals (R. 29, 30, 73–74). Petitioner Brown was on one of these yachts (R. 31).

In October 1935 defendant Robin purchased a small tanker, the *Charles D. Leffler* which had been used for carrying petroleum products and which had been laid up, out of service, for about two years (R. 110–111, 115–116).[3] Between October 7 and November 14, 1935, while the vessel was being repaired at Baltimore (R. 168–172, 182, 183), Robin sold it to the Economy Oil Transportation Corporation (R. 124, 125, 191, 192). Petitioner Wade was president of this company, arranged for its incorporation, rented an office, signed correspondence on the company's letterhead, and was being paid $25 a week salary by defendant Josephs, known to Wade as Nielson (R. 95–96, 125, 482, 487). Wade signed the oath of ownership, and

[3] Defendant Watson contributed toward the purchase price, and shared in the proceeds of the subsequent sale, of the vessel.

petitioner Larkey signed the oath as Master, for enrollment of the *Leffler* at the Customs Office (R. 125, 126, 195–196, 483). Petitioner Larkey had his brother Raymond employed as chief engineer (R. 155–156), and after the first week Raymond received his salary from his brother (R. 160). Raymond later quit because "there was too much work for one man in the engine room department" (R. 165), but before leaving he instructed the petitioner Holland "about the duties of engineer" of the vessel (R. 159).

While the *Leffler* was in drydock at Baltimore, Larkey and petitioner Brown, the latter using the name Andrews, came aboard the vessel, and Brown authorized and supervised repairs on behalf of the Economy Oil Transportation Company in addition to those which Robin had originally ordered (R. 157, 169–170, 178–179, 187).

On November 14, 1935, the *Leffler* left drydock (R. 188) and during the same month contacted the *Anna D.* of Yarmouth, captained by defendant Collins,[4] off Hog Island Light, and took on 2,000 cases of alcohol. Two contacts were made, and during the second contact the water was rough and the boats came together, damaging the port side rail of the *Leffler*. Petitioner Brown was observed

[4] In November 1935 the *Anna D.*, captained by Collins, had sailed from Yarmouth, and after obtaining 2,000 cases of alcohol from a tramp steamer at St. Pierre, Miquelon, had proceeded to its contact with the *Leffler* (R. 31–33).

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aboard the *Leffler* at the time (R. 31–33). The record does not show what disposition was made of the alcohol transferred to the *Leffler,* but in December 1935 the damage to the port side rail was repaired at a New York drydock, the vessel leaving the dock on December 8 (R. 197, 198) and returning on December 21 for other repairs (R. 199). In April 1936 more repairs were made, and new tanks were installed (R. 202–204). The Economy Oil Transportation Corporation had these repairs made (R. 198, 201, 202, 204).

On or about March 23, 1936, the vessel *Hillfern* loaded 187,000 gallons of alcohol at Antwerp, Belgium (R. 234, 258–259), and Gerke, using the name Stanley, was present at the dock with agents of the distillery furnishing the alcohol when the loading began (R. 236–237, 260, 262).[5] The *Hillfern,* ostensibly bound for Uruguay (R. 258), and captained by defendant Collins (R. 92), left on March 30, 1936 (R. 238). Gerke then returned to the United States aboard the S. S. *Europa* which

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[5] The agent for the distillery testified as follows:

Q. Do you know who the charterers were? * * *
A. I am under the impression that Meeus [the distillery] was the charterers (R. 249).

* * * * *

Q. Do you know who Mr. Stanley was? A. We know that Mr. Staney was connected with the business.

Q. What business? A. The business of loading that boat.

Q. The *Hillfern?* A. With Messeurs Meeus (R. 250).

docked in New York on April 6, 1936 (R. 271–275), and, at a hotel in Brooklyn, told Oda Papathanos, of Yarmouth, Nova Scotia, that he was expecting her friend, defendant Collins, in New York by Easter time,[6] and gave her $100 Collins had sent. She said she wished to see Collins but Gerke said she could not do that but that he, Gerke, could get a note out to him at some place near New York (R. 280, 282, 283–285).[7] Sometime between March 30 and April 25, 1936, about 100 miles at sea off the American coast, the *Hillfern* contacted and transferred to the *Leffler* 50,000 gallons of alcohol (R. 302–303, 309). This alcohol was being unloaded at a dock at Bayway, New Jersey, on the night of April 25, 1936, when the *Leffler* was boarded by Coast Guardsmen and Customs officers from a patrol boat (R. 291–293, 305, 309). The officers found no one aboard the vessel, and proceeded to the dock where they found that alcohol was being pumped from the ship's tanks to storage tanks ashore (R. 292–293, 296–297). A man, identified as the petitioner Turansky, approached them from the darkness, and when asked "Who are you?" replied, "I am the watchman." He resisted and they had to use force to place him under arrest (R. 293).

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[6] According to the World Almanac for 1936 Easter fell on April 12 in 1936.

[7] The witness Oda Papathanos thought the name of the boat was "the *Hillcrest*, or something like that" (R. 280) but it is not clear from her testimony whether Gerke told her this name or she saw it on the outside of the envelope.

Turansky would not say "who he was watching for" (R. 298), but he was not a watchman for the owners of the dock (R. 218, 579).

Later, after midnight, petitioners Larkey and Holland came to the dock and were arrested (R. 300–302). Larkey admitted he was captain of the boat and that he had obtained the alcohol "out at sea about a hundred miles" and that he got it "off the *Hillfern.*" When the officers sought to ascertain the whereabouts of the *Hillfern* so that they could go out after it, Larkey stated "There is no sense of going out, the name *Hillfern* don't appear any more, the name has been erased and the home port has been erased. Besides, by the time you get out there the boat will probably be returning to her home port." (R. 302–303.)[8] Petitioner Holland said his name was Wentzel, and admitted that he was the engineer of the *Leffler* (R. 302). Personal papers of petitioner Brown, including an auto license, were found in the captain's cabin on the vessel (R. 303–304, 473). The dock at which the *Leffler* was tied up had been leased on April 14, 1936, for a term of three years, by "Morris Slavin, doing business under the firm name and style of Criterion Oil Company" (R. 218–219, 221). The Slavin who so signed the lease was identified as the petitioner Wade (R. 222, 228–230). When

[8] Larkey also stated to the officer "No use fooling. You are on one side of the fence and I am on the other side of the fence; that is the chances we must take" (R. 303).

Wade read in the paper that the *Leffler* had been seized he fled to Seattle (R. 485–486) and presented himself to the police there four years later when he "heard" he was "wanted" (R. 493).

ARGUMENT

As to each petitioner it is contended that there was a complete failure of proof and that the trial court erred in not directing a verdict of acquittal on all three counts.[9] However, "the verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it" (*Glasser* v. *United States,* Nos. 30–32, this Term), and we think it is clear from the summary of evidence, *supra,* pp. 4–11, that there was ample evidence to sustain the verdict.

As to counts 1 and 2, which involved the liquor imported in the *Leffler,* there was evidence that each of the petitioners assisted in effecting the illegal importation covered by these counts, and, under 18 U. S. C., Sec. 550, by aiding and abetting the illegal importation they all became liable as principals. Wade arranged for incorporation of the company which purchased the *Leffler;* was president of the corporation at $25 per week; rented an office for, and signed correspondence of the corporation; and

[9] As to counts 1 and 2: Gerke, Pet. 12–20; Turansky, Pet. 26–31; Holland, Pet. 31–38; Wade, Pet. 38–44; Larkey, Pet. 44–49; Brown, Pet. 49–54. As to count 3, Pet. 20–26.

executed a lease for the dock at Bayway where alcohol was being unloaded from the vessel when it was seized.[10] (R. 95–96, 125, 218–219, 221, 222, 228–229.) Brown authorized and supervised the conditioning of the vessel for its rum-running purposes (R. 157, 169–170, 178–179, 187, 459, 461, 570–571), and his personal papers were found in the captain's cabin when it was seized on April 25th (R. 303–304, 473).[11] Gerke, one of the "big shots," saw to it that the *Hillfern*[12] obtained at Antwerp the alcohol (R. 236–237, 249–250, 260, 262) which was later transferred to the *Leffler* 100 miles off the United States coast (R. 302–303).[13] As to the

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[10] His explanation that he was merely an innocent dupe of the defendant Josephs, known to him as Nielson (R. 487, 491), was inconsistent with his flight to Seattle and, at most, merely raised a question of credibility which was for the jury.

[11] His explanation that he was aboard the vessel in Baltimore because he had been hired to install a generating plant, and that he had lost his wallet containing his driver's permit (R. 457–460, 473), also merely raised a question of credibility, which was for the jury.

[12] The testimony of the witness Oda Papathanos indicated that Gerke was aware that the true destination of the *Hillfern* was near New York, not Uruguay.

[13] The petitioner repeatedly asserts (Pet. 8, 16, 24) that there is no proof of the "most vital link in the [Government's] chain", that the *Leffler* ever met or received alcohol from the *Hillfern*. The record shows that petitioner Larkey admitted to the arresting officer that he was the captain of the *Leffler* and that he had obtained the alcohol from the *Hill-*

others, it need only be said that by their respective admissions Larkey was the captain, and Holland was the engineer (R. 302) of the rum-runner, and Turansky was the "watchman" (R. 293) while the alcohol was being illicitly discharged from the vessel (R. 291–293, 296–297, 305, 309).[14]

As to count 3, which relates to the conspiracy covering all of the shipments between January 1935 and April 1936, petitioners claim that certain specific acts by means of which the conspiracy was alleged to have been accomplished were not proved (Pet. 20–24). However, it does appear that there was evidence tending to prove that the *Reo I,* the *Augusta and Raymond,* and the *Anna D,* obtained

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fern (R. 302–303). Customs Inspector Lipski testified as follows in this connection (R. 302–303):

> I had further conversation with Larkey. I said to him, "Where did you get this alcohol from?"
>
> He said, "Well, if you must know I got it out at sea about a hundred miles."
>
> I said, "Never mind out to sea. What is the name of the ship you got it on?" At first he didn't answer. I repeated the question several times. Then he says, "You know I got it off the *Hillfern.*" I turned around. I said, "Listen, Larkey, where is this *Hillfern?* I want to send word, we may as well grab her the same as we have got you and make a complete job of it." He turned around and he said to me, "There is no sense of going out, the name *Hillfern* don't appear any more, the name has been erased and the home part has been erased. Besides, by the time you get out there the boat will probably be returning to her home port."

[14] The testimony as to each individual petitioner is reviewed by the Circuit Court of Appeals at R. 681.

their illicit cargoes at the instigation, and with the knowledge of Gerke, Levin and Collins; that these defendants were instrumental in having these vessels proceed to points off the New York and New Jersey coasts to meet contact boats (R. 22–24, 27–30, 31–33, 38, 40, 57–60, 68, 71–74); that Brown arranged for, and caused the use of contact boats on at least two occasions and obtained alcohol obviously to be smuggled ashore (R. 31, 60); that Gerke was instrumental in chartering the *Hillfern* and in obtaining its cargo at Antwerp (R. 236–237, 249–250, 260, 262); and that Collins, Holland and Larkey effected the rendezvous 100 miles at sea of the *Hillfern* and *Leffler* and caused 50,000 gallons of alcohol to be transferred to the latter vessel[15] (R. 92, 302–303).

Petitioners also claim that all the overt acts alleged were not proved (Pet. 24–26). But it was not necessary to prove more than one (*Burkhardt* v. *United States,* 13 F. (2d) 841, 842 (C. C. A. 6); *Hardy* v. *United States,* 256 Fed. 284, 288 (C. C. A. 5), certiorari denied, 250 U. S. 659), and it is undeniable that, according to the Government witnesses, defendants Collins and Brown took the *Reo I* up the Raritan River to the old brick-

[15] In view of this proof, we submit that the failure of the Government to establish that the defendants placed on the *Hillfern* tanks suitable for transportation of alcohol as alleged (R. 14) was inconsequential.

yard where its cargo was illicitly transferred to waiting trucks ashore (R. 25, 26, 28–29, 59–64), which testimony established the commission of overt act No. 3 (R. 15–16) of the indictment; and that Larkey, Holland and others unlawfully imported alcohol in the *Leffler* on April 25, 1936, at Bayway, New Jersey, as charged in overt act No. 8 (R. 16–17) (R. 291–293, 296–297, 302, 303).

In addition, we submit, there was evidence from which the jury could have found that Gerke met with and employed Collins to take command of the *Reo I* (R. 27–28, 40, 43) as charged in overt act No. 1 (R. 15); that Collins, at the direction of Gerke and Levin obtained alcohol at St. Pierre, Miquelon, and discharged it into small boats for smuggling ashore (R. 22, 23, 27–28, 40, 58–59), as charged in overt act No. 2 (R. 15); that Collins caused a quantity of alcohol to be transferred to the *Augusta and Raymond* at a point off Gallantry Head (R. 29, 30, 73–74), as charged in overt act No. 4 (R. 16); that Brown and Collins caused a quantity of alcohol to be transferred to a contact boat (R. 31–33), as charged in overt act No. 5 (R. 16); that Gerke had the *Hillfern* loaded with alcohol at Antwerp (R. 236–237, 260, 262), as charged in overt act No. 6 (R. 16)—it not being necessary that the evidence show that Levine participated, as charged, *Hardy* v. *United States*, *supra*, p. 288; and, finally, that Collins, Larkey and Holland caused the transfer of alcohol from the

Hillfern to the *Leffler* (R. 92, 302–303) as charged in overt act No. 7 (R. 16)—failure to show Brown's participation not being fatal. *Ibid.*

Petitioners also contend (Pet. 25–26) that instead of proving a general conspiracy, as charged, the Government merely proved a series of "unrelated acts, each of them a substantive crime in itself, if anything." However, "where [as here] the overt acts are of a character that are usually, if not necessarily, done pursuant to a previous scheme or plan, proofs of the acts have a tendency to show such preexisting conspiracy, so that when proved they may be considered as evidence of the conspiracy charged, and if the established facts and inescapable inferences are inconsistent with the accused's professions of innocence, it becomes the problem of the jury to weigh the evidence and determine, under proper instructions dealing with the quantum of evidence of proof necessary to convict, the guilt or innocence of the accused" *United States* v. *Beck,* 118 F. (2d) 178, 186 (C. C. A. 7), certiorari denied, 313 U. S. 587. The trial court submitted the evidence to the jury under proper instructions as to the quantum of proof necessary to convict (R. 600, 607, 615–625, 627),[16] and no reason appears why the verdict of the jury should not be sustained.

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[16] The court also instructed the jury fully as to the Government's obligation to prove the elements of a conspiracy (R. 603–605, 616–618, 622–626).

CONCLUSION

The only question is one of fact decided by a jury, and left undisturbed by two courts. Petitioners make no showing which would warrant further review by this Court. *Delaney* v. *United States,* 263 U. S. 586, 589–590. The decision below is correct and there is no conflict of decision nor any question of general importance. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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